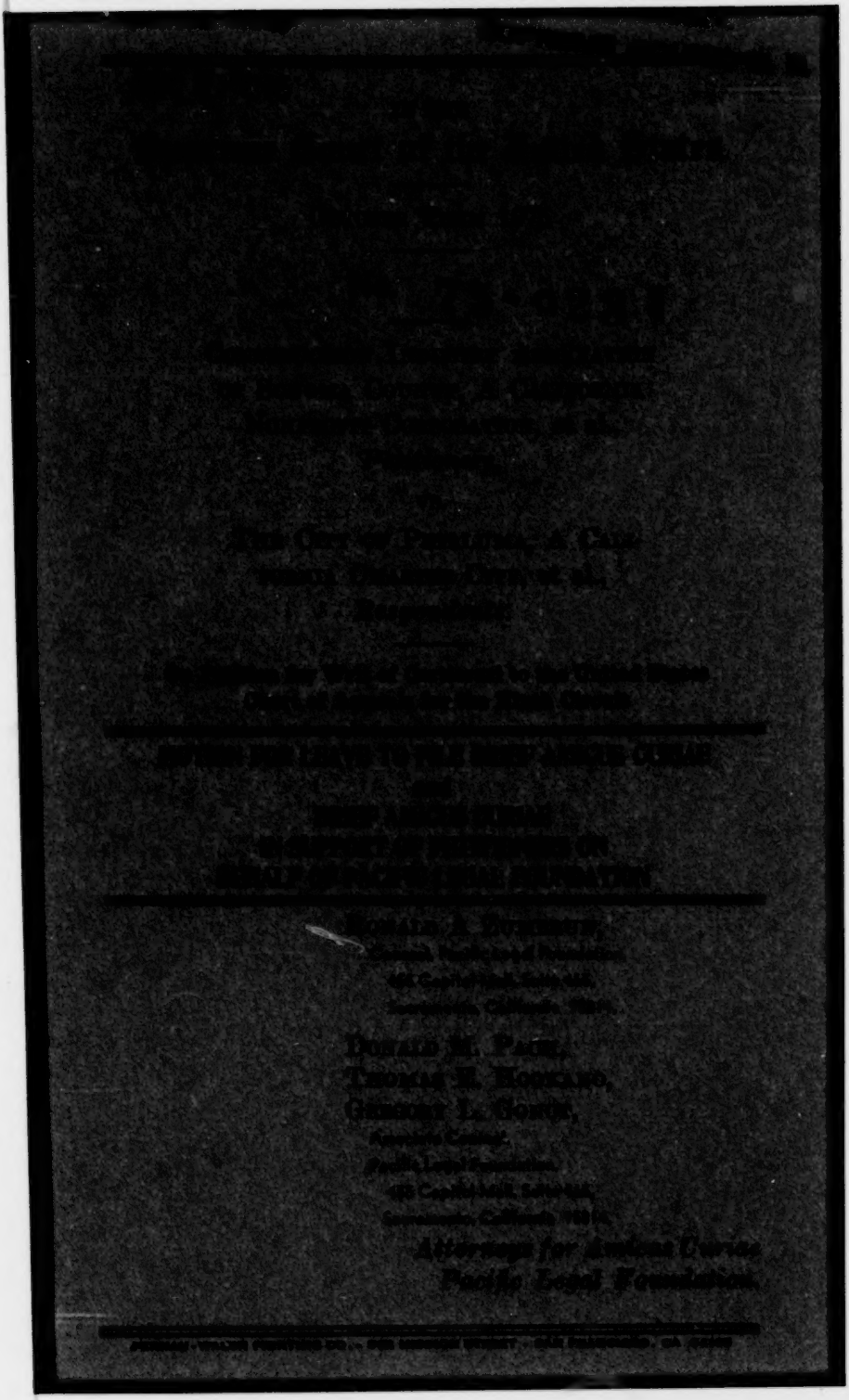

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No.

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, A CALIFORNIA NONPROFIT CORPORATION, et al.,
Petitioners,

vs.

THE CITY OF PETALUMA, A CALIFORNIA CHARTER CITY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

Motion of the Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42, Rules of the Supreme

Court of the United States. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for respondents was requested but refused.

INTEREST OF AMICUS

The Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Foundation is set by a seventeen-member Board of Trustees composed of concerned citizens. Ten of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The court of appeals upheld the Petaluma Plan—a municipal growth control scheme which imposes a limit on construction of residential dwellings far below market demands. Over and above its negative effects on individual property rights, the plan inflicts serious economic, social and environmental harm on the community and region as a whole. This becomes evident upon examination of the three contingencies which the plan creates. First, demands for housing unsatisfied in Petaluma will generate more housing construction in other communities and thereby cause those communities to bear a disproportionate share of

the burdens associated with growth. Secondly, the plan will cause more housing to be constructed in rural and agricultural areas outside of the municipality and thus contribute to urban sprawl. Thirdly, some housing needs, and particularly those of low and moderate income people, will go unsatisfied. The court below recognized the interdependence of communities within a region and the plan's potential to frustrate legitimate regional housing needs, but suggests that it is up to the Legislature to solve this problem.

The Pacific Legal Foundation is concerned by the court of appeal's refusal to require the municipality to consider the interests of those who are situated outside of its boundaries. Pacific Legal Foundation seeks to represent the interests of those adversely affected persons who reside beyond the City of Petaluma. Among the foregoing interests are those of the worker, the unemployed, the consumer and the many families who are and will continue to be faced with the need for decent, affordable housing within reasonable traveling distance of their source of livelihood.

In furtherance of the interests which it seeks to represent, Pacific Legal Foundation will submit its argument that this Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), requires a balancing of local and nonlocal interests in determining whether land use legislation is a valid exercise of the police power under the general welfare concept.

For the foregoing reasons, Pacific Legal Foundation respectfully requests leave to file the annexed

brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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December, 1975.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit, in an opinion reported at 522 F.2d 897

(9th Cir. 1975), reversed the decision of the United States District Court for the Northern District of California (375 F. Supp. 574 (N.D. Cal. 1974)), and held that the respondent City's plan for limiting its population growth was a valid exercise of the police power.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS HAS AN IMMEDIATE IMPORTANCE FAR BEYOND THE PARTICULAR FACTS AND PARTIES

The court of appeal's decision in this case comes at a time when there is an urgent national need for more and better housing. Despite this need, housing starts have fallen off badly in the past few years and the prices of new homes have skyrocketed.[1] If allowed to stand, the decision of the court below will worsen the housing situation in this country by encouraging municipalities to severely restrict new residential construction whenever they encounter any real or imagined difficulties in accommodating population growth.

The court below has upheld a municipal ordinance which limits new residential construction to a maximum of 500 development units per year. This was allowed in spite of the fact that market demands greatly exceeded the permitted quota. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 375 F. Supp. at 575. In addition, the ordinance predeter-

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[1] *See Wall Street Journal,* December 10, 1975, at 1, a copy of which has been lodged with this Court under separate cover.

mined the geographical extent of the City's growth with an urban extension line to last for 20 or more years. Population densities within the urban extension line were set at levels of no more than 55,000 people. In the absence of such restrictions, the City was projected to have a population of 77,000. Thus the City's measures would prevent some 22,000 people from residing within its boundaries. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 375 F. Supp. at 576.

Two questions are raised by these policies. First, where will housing be provided for the 22,000 excluded from housing? Second, what will be the character of the 500 families who do manage to acquire housing annually in Petaluma?

The contingencies that will occur with respect to housing for those excluded are as follows:

1. Additional housing will be built in other existing communities;

2. Housing will be built in areas which are not presently used for urban purposes; and

3. Some of the demand will remain unsatisfied.

Moreover, other communities faced with the prospect of having to handle Petaluma's unwanted growth potential can be expected to shield themselves with growth control plans of their own.[2] For whatever reason these plans are adopted, as more of them

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[2]Haar, *Wayne Township: Zoning For Whom?—In Brief Reply,* 66 Harv. L. Rev. 986 (1954).

come into existence, the total number of people excluded from existing communities in the area will increase. As the availability of housing in these communities declines, more housing will be built in non-urban areas, and, because of the need to extend municipal-type services to those areas, the cost of that housing will be greatly increased. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma*, 375 F. Supp. at 579. Such housing is also costly to the environment. Thousands of acres that should be maintained as farm land or open space will be wasted for urban development that could have been accommodated in already urbanized areas.

In any event, much of the demand for housing that is built up by growth control schemes will remain unsatisfied. This situation is destructive of the filtration process whereby the construction of one new unit makes it possible for a succession of several moves to occur.[3] The process enables the affected parties to attain better housing conditions and is particularly beneficial to those in lower and moderate income categories. Millions of dollars are being spent by the federal government to create better housing conditions. It would be absurd and tragic if the na-

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[3]*See New Homes and Poor People, a Study of Chains of Moves*, Survey Research Center at the University of Michigan (1969), a copy of which has been lodged with this Court under separate cover. The study, which was made in seventeen metropolitan areas and involved more than 3,500 interviews, shows that the construction of one new unit makes it possible for a succession of 3.5 moves to occur to different and typically better housing accommodations. *See also* the trial court's opinion below, 375 F. Supp. 574, 580 (1974).

tion's goals of stimulating more and better housing[4] would be frustrated by local goals of limiting housing.

In short, the Petaluma Plan does much more than merely relieve the respondent City of a planning burden and harm the particular economic interests of the petitioners. It also promotes the alarmingly rapid conversion of rural land to urban land and unleashes destructive forces in a housing market that was already falling far short of meeting this country's housing needs. Thus it is evident that this case has an immediate importance far beyond the particular facts and parties involved.

II

IN UPHOLDING THE PETALUMA PLAN THE COURT OF APPEALS USED AN ERRONEOUS CONCEPT OF THE GENERAL WELFARE THAT IS NOT IN HARMONY WITH THIS COURT'S DECISION IN EUCLID v. AMBLER REALTY CO.

In 1926, this Court decided the celebrated case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court in *Euclid* was faced with a challenge to the municipal land use scheme of Euclid, Ohio, which divided the City into a number of use districts. The challenged scheme was upheld as a valid exercise of the police power. The Court decided that a municipality located in the path of regional industrial development may divert such development in the interest of protecting the health, safety, and welfare of its own residents. However, the Court warned:

> "It is not meant by this, however, to exclude the possibility of cases where the general public

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[4] *See* Karlin, *Zoning: Monopoly Effects and Judicial Abdication*, 4 Sw. U. L. Rev. 1, 4-5 n. 10.

> interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390.[5]

The *Euclid* caveat has been interpreted by several state courts to require a balancing of municipal interests against larger public interests to determine whether a police power regulation promotes the general welfare and is valid. These courts have not deemed such balancing, whether it be termed local versus regional interests, to be a legislative function. The court of appeals citing *Euclid v. Ambler Realty Co., supra,* recognized that "zoning regulations 'must find their justification in some aspect of the police power asserted for the public welfare'" *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 522 F.2d at 906. The court of appeals also recognized that the concept of the public welfare is broad and inclusive. *Id.* It nevertheless concluded that it was for the legislature to "adjust the system" so that the delegated zoning power would better serve the state interest in furthering the general welfare of the entire region or entire state. *Id.* The court stated it is not the duty of the federal court to "mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests." *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 522 F.2d at 908.

There is a glaring inconsistency between the decisions of state courts as regards the concept of the general welfare established by *Euclid* and the court

[5]The above quoted *Euclid* statement will be referred to herein as the *Euclid* caveat.

of appeals below. The question posed is whether the state courts are incorrect in their interpretation of the *Euclid* caveat or whether the federal court is in error in not applying the broader concept of the general welfare. Only this Court can answer the question by granting certiorari in this case. The divergence between the state courts and the court of appeals in regards to *Euclid* is outlined *infra.*

A. Recent State Court Decisions Have Mandated a Broad Concept of the General Welfare

In recent years state courts have frequently grappled with the *Euclid* caveat in recognition of the fact that many contemporary land use problems, such as maintaining air and water quality and balancing the allocation of land space among competing demands, transcend municipal boundaries.[6]

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[6]The evolution of the judicial trend to require a regional perspective in land use planning may be evidenced by a reading of the following cases: *Duffcon Concrete Products, Inc. v. Borough of Cresskill,* 64 A.2d 347 (Pa. 1949); *Borough of Cresskill v. Borough of Dumont,* 104 A.2d 441 (Pa. 1954); *National Land and Investment Co. v. Kohn,* 215 A.2d 597 (Pa. 1966); *Oakwood at Madison v. Township of Madison,* 283 A.2d 353 (N.J. 1971); *Appeal of Girsh,* 263 A.2d 395 (Pa. 1970); *Appeal of Kit-Mar Builders,* 268 A.2d 765 (Pa. 1970), and *Scott v. City of Indian Wells,* 6 Cal. 3d 541 (1972). Although the California Supreme Court in *Scott* did not expressly refer to the *Euclid* caveat, the decision reflects the broader concept of the general welfare. The California Supreme Court considered the actions of the City of Indian Wells in permitting a development near its borders which affected the surrounding noncity residents. The court expanded the protection afforded nonresidents and held that they were entitled to notice and an opportunity to be heard to challenge zoning decisions that affect their interests. By extending standing to nonresidents, the California Supreme Court requires the municipality to give full consideration to nonresident property interests; in effect, imposing a duty to consider regional externalities.

The following articles provide helpful discussion of the issue of whether municipalities must consider regional needs: Com-

In *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus,* 220 A.2d 97 (N.J. 1966), the New Jersey Supreme Court stressed the nonlocal approach to the meaning of "general welfare." In his concurring opinion, Mr. Justice Hall commented, with regard to an ordinance which prohibited schools in a residential area, that an unqualified prohibition cannot be allowed to stand where its purpose is to further some indefensible parochial interest at the expense of interests which transcend municipal boundaries. He stated that:

> "In my view, such action is not legitimately encompassed by the zoning power and the courts have to and should say so. *The substantive question seems to me to fall clearly within the following language from the foundation case of Village of Euclid, Ohio v. Ambler Realty Co.* (citations omitted)." *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, supra* at 103.

The line of New Jersey and Pennsylvania cases cited herein at footnote 6 has culminated in two important zoning decisions which highlight the degree of importance attached by state courts to this Court's statements in *Euclid.*

In *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel,* 336 A.2d 713 (N.J. 1975), the New Jersey Supreme Court considered provisions of Mount Laurel's zoning code. The New Jersey court

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ment, *Judicial Limitations on Parochialism in Municipal Land Use Decisions: Scott v. City of Indian Wells,* 25 Hastings L.J. 739 (1974); Comment, *Validity of Local Ordinances Depends on Considerations of Regional, Not Merely Local, General Welfare,* 25 Vand. L. Rev. 466 (1972); Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?,* 3 Conn. L. Rev. 244 (1971).

held that certain code provisions were invalid because they failed to provide for adequate development of low and moderate income housing. The court pointed out that zoning, as an exercise of the police power, must address itself to the general welfare. As to *whose* general welfare must be recognized the court stated:

> "[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as the state. *So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.*
>
> "This essential was distinctly pointed out in *Euclid* where Mr. Justice Sutherland specifically referred to '. . . the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.'" *Id.* at 726 (emphasis added).

The *Mt. Laurel* decision clearly requires the "non-local" approach to the meaning of the "general welfare" in cases involving facilities of broad public benefit, such as housing.

In another case, New York's highest court ruled that towns *must* zone for a balanced and integrated community. In *Berenson v. Town of New Castle,* ..... N.E.2d ..... (No. 430, N.Y. Ct. of App., December 2, 1975), the New York Court of Appeals ruled that the Town of New Castle, whose zoning ordinance excludes multi-family residential housing, must defend

the reasonableness of its entire ordinance in a suit by a landowner desiring to construct an "age-oriented" condominium development, including multi-family housing. The appeals court decision requires the lower court to analyze New Castle's zoning in terms of its impact on *regional* housing needs in determining the reasonableness of the land policy. The court stated:

> "[T]here must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met." (Slip Op. filed Dec. 2, 1975, at 8.)

It is undeniable that *Euclid* has given rise to an adoption of the regional standard for reviewing the validity of local land use decision making in the state courts. Adoption of this regional standard comes as a result of the recognition that the parochial exercise of land use regulatory authority can no longer be tolerated where to do so would force one community to absorb the burdens which another would cast off.[7]

B. The Refusal of the Court of Appeals to Require A Balancing of Local v. Nonlocal Interests Violates The Meaning of Euclid

The trial court found that if the Petaluma Plan proliferated throughout the San Francisco region, the deficit in needed housing would be approximately 105,000 units for the decade 1970-1980. *Construction*

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[7]If Petaluma can control population growth, without regard to external or internal factors, other communities will adopt like measures to prevent a disproportionate share of the burdens incident to increasing population from descending upon them. There is currently a propensity to adopt a variety of measures with which to control growth. *See* Clark, *Growth Control in California: Prospects for Local Implementation of Timing and Sequential Control of Residential Development,* 5 Pac. L.J. 570, 594-602 (1974).

Ind. Ass'n. of Sonoma Cty. v. City of Petaluma, 375 F. Supp. at 580. The court of appeals has given Petaluma carte blanche authority to wholly ignore such needs in devising its growth control plan. This is in sharp contrast to the reasoning of the New Jersey Supreme Court in *Mount Laurel* which required a nonlocal approach to the general welfare in cases involving facilities such as housing.

Although the court of appeals conceded that "some persons desirous of living in Petaluma will be excluded under the housing permit limitation and that, thus, the plan may frustrate some *legitimate regional housing needs,*" it refused to address the question of whether promotion of Petaluma's self-interest justified the sacrifice of legitimate regional housing needs. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 522 F.2d at 905 (1974) (emphasis added). State courts citing *Euclid* have held such inquiry to be mandatory.

The court of appeals reached a contrary conclusion, relying on *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), and *Ybarra v. City of Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974), and held that the "concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace." *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 522 F.2d at 909. *Amicus* Pacific Legal Foundation submits that such holding is erroneous in that it is not the *legitimacy* of the interest that

justifies the means, but whether, in the balance, the promotion of local interests can be allowed to sacrifice the general public interest. *Amicus* submits that *Belle Terre* must be read in conjunction with *Euclid,* which the court of appeals failed to do. Such reading would result in an invalidation of the *means* by which the local interests are sought if the interests of the region were of greater importance and would otherwise be sacrificed.

We submit, contrary to the opinion of the court of appeals, that *Belle Terre* was never intended to allow parochialism or selfish municipal interests to control, where a land use regulation can and does have the far-reaching effects as demonstrated in this case.

Amicus submits further that the state courts are correct in their interpretation of *Euclid. Euclid* does not contemplate that the court should be required to perform the task of a regional planner. Nevertheless, *Euclid* does contemplate that the courts will require that municipalities balance nonlocal with local interests in regards to a specific land use proposal.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted herein for the reason that the decision of the court of appeals has an immediate importance far beyond the particular facts and parties involved in this case and is predicated upon prior de-

cisions of this Court whose implications are in need of clarification.

Respectfully submitted,

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